United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,116

305

DONNIE C. THOMPSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, JR.,
JUDITH ANN WILSON,
Assistant United States Attorneys.

Cr. No. 1215-65

QUESTION PRESENTED

Was there probable cause for appellant's arrest where the arresting officer: (1) saw appellant sitting on the edge of a bathtub on the permanent residents' floor of a hotel with an unconscious woman lying on the floor; (2) saw that the woman had needle marks on her arm which the officer, from his experience, believed to derive from narcotics; (3) talked to the hotel manager and security guard who had summoned the police and said appellant did not live there; (4) heard appellant give conflicting and evasive explanations in accounting for his presence in the hotel premises and in the fifth floor bathroom in particular; (5) was told by appellant he was looking for a friend he did not name but who had a room, on a different floor, the number of which he did not know; (6) found two glassine bags with traces of white powder, one a few feet from appellant and the other under the woman's arm; and (7) observed narcotic paraphernalia being recovered inches from appellant's feet?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,116

DONNIE C. THOMPSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 1, 1965 appellant was charged in a two-count indictment with possession of a narcotic drug in violation of 26 U.S.C. § 4704a and facilitation of concealment and sale of narcotic drug in violation of 21 U.S.C. § 174. Subsequent to his plea of not guilty and prior to trial appellant filed a motion to suppress evidence seized pursuant to his arrest; that motion was denied after a hearing before Judge Howard Corcoran on January 14, 1966. A trial before Judge Corcoran and a jury resulted in a verdict of guilty on both counts on

February 24, 1966. Appellant was sentenced for a period of not less than one nor more than three years on count one and to five years imprisonment on count two, the sentences to run concurrently.

Evidence illicited at trial and at the suppression hearing showed that Officers Johnson and Felder, in response to a radio "run" for a "man down", arrived at the Dunbar Hotel around 11:00 a.m. and were met by the hotel security guard (Tr. 57-58, 104, 132, 139, 142). The guard told them they had been summoned because a man, who did not live in the hotel, was in the fifth floor bathroom with an unconscious woman; that despite efforts by the hotel manager and himself to learn what had happened and who the man was, the man offered no assistance (Tr. 59-60). Prior to the officers' arrival Mr. Hagen, the hotel manager, had been summoned to the fifth floor and met by Mr. Modkin, a resident of the hotel, outside of the bathroom adjacent to Room 517 (Tr. 76, 80, 138).[1] The fifth floor was reserved for permanent residents (Tr. 80, 139). Mr. Modkin said he had been trying for some time to get in the bathroom but a man and woman were inside (Tr. 76-77). The manager knocked on the door; it was locked (Tr. 78). He waited about five minutes and during that time heard a scuffling of feet (Tr. 79). When no one opened the door or replied in response to his knock he used a pass key to open the door (Tr. 78-79). The hotel security guard was standing just outside the bathroom door (Tr. 139). Upon opening the door the manager saw a woman lying on the floor, her head towards the door, and appellant sitting on the edge of the bathtub (Tr. 77, 138).[2] Both

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[1] This was around 10:30 a.m. or 10:45 a.m. Appellant testified he arrived at the hotel about 9:30 a.m. (Tr. 19) and was inside the bathroom for forty-five minutes before the manager knocked on the door (Tr. 23). The officers arrived at the hotel sometime between 11:03 a.m. and 11:20 a.m. (Tr. 57, 104, 132, 138, 142).

[2] The bathroom contained a bathtub, sink, radiator and toilet; they were on the manager's left as he entered the bathroom (Tr. 11).

were fully dressed (Tr. 28, 61, 101, 103, 115, 116, 132). The manager was familiar with the people who were permanent residents of the hotel and knew the woman and appellant were intruders, not residents (Tr. 81, 139). He told appellant he was calling the police unless he could explain the condition of the woman on the floor (Tr. 78). Appellant told the manager he had been looking for a friend, whom he did not name; he said his friend had a room at the hotel, on a different floor, although he did not recall the room number (Tr. 10, 20-22, 80); appellant evasively gave three different floor locations for his friend's room [3] and claimed only to be helping the unconscious woman (Tr. 13, 79-80). The manager decided to summon the police (Tr. 77, 138-139) since appellant and the woman were unregistered guests who were off limits, had been occupying the fifth floor bathroom for an unusual amount of time, and appellant was unable to give any explanation for the unconscious woman on the floor (Tr. 139).

When the officers arrived on the fifth floor they saw the hotel manager standing in the doorway; appellant was still sitting on the edge of the bathtub (Tr. 60, 112). The manager told the officers the fifth floor was for permanent residents and that appellant did not live there (Tr. 74, 81, 139). The unconscious woman was still lying face up on the floor (Tr. 60). Her coat was heaped on the floor and one sleeve of the sweater she was wearing was rolled up (Tr. 61). The pulled-up sleeve enabled one officer to see needle marks on her arm, indicating to him, in view of his experience, that she had recently taken a dose of narcotics (Tr. 61, 69-70).[4] Appellant

[3] Mr. Hagen testified that appellant first told him his friend lived on the third floor but later changed it to the fourth floor. He had previously told Mr. Modkin his friend lived on the sixth floor (Tr. 80.)

[4] Officer Johnson had been on the police force for nearly three years. During that time he had made several arrests involving narcotics. He had received instructions regarding arrests in the narcotics field and had been shown and told what narcotics looked like. The officer was familiar with the color and appearance of

was fully dressed (Tr. 101, 103, 115, 116, 132, 133). Empty glassine bags with traces of white powder were lying next to the toilet, about six inches from the woman's head and a few feet from appellant, and also under the woman's arm (Tr. 38, 63-65). While the officer was questioning appellant, the manager found a black rag under the bathtub just six to twelve inches from appellant's right heel (Tr. 62, 65-67, 79). He handed it to the officer who inside found narcotic paraphernalia—needles, syringes, bottle caps ("cookers") and empty glassine bags bearing traces of white powder (Tr. 66-67).

Appellant substantially admitted this version of the facts but he said he had gone to the hotel to see a friend, whom he admittedly knew only by the name of Green and who lived on the third floor;[5] he could not state the room number (Tr. 10-11, 19-21, 23, 40). According to appellant, he was just walking around when he happened to see a woman lying on the floor of the fifth floor bathroom (Tr. 23, 25, 27-28, 62).[6] It was his story

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the powder found inside narcotic "decks", the flat cellophane-type bags, and with heroin capsules. In addition, he previously had observed a person who was suffering from an overdose of narcotics. (Tr. 56-57, 61, 100, 105, 107, 110-111.) His partner, Officer Felder, had been on the police force for twenty-three years and he too had made arrests involving narcotics (Tr. 128; 130-131).

[5] Appellant had told the security guard that Green lived on the third floor (Tr. 40-42). At one point he told the manager this (Tr. 43) and then he changed his story (Tr. 80). He told the police that Green lived on the sixth floor (Tr. 62).

[6] Appellant admitted he did not know Green's first name or who Green was or what he looked like (Tr. 20-22). Despite the fact that he had forgotten Green's room number before he came to the hotel (Tr. 21-22), he claimed he was in too much of a hurry to stop at the hotel desk on the first floor (Tr. 23). Although he was not too clear about how he intended to locate Green in the hotel, which had more than five stories (Tr. 23, 25), he did not intend to make a room-by-room search (Tr. 23). Rather he was looking for one of the "tenants" who, presumably, might know where Green's room was located (Tr. 23). He got on a self-service elevator and pushed the fifth floor button for "no particular reason" (Tr. 24). He got off and turned left, again for no particular reason (Tr. 27), and about twenty-five feet from the elevator he noticed a woman

that he did not know the woman and entered the bathroom only to help her (Tr. 12-13, 28-31, 42). He was unable to offer any explanation of how he was assisting the woman by sitting on the edge of the bathtub for forty-five minutes or to explain why he shut the door, which was open when he first noticed the woman (Tr. 29-31). He denied he had locked the bathroom door (Tr. 32-33, 35). Appellant asserted that the hotel manager had not used a key to open the door and the hotel security guard had entered the bathroom first (Tr. 35, 37, 39). He denied using narcotics and that the narcotic paraphernalia belonged to him (Tr. 15, 37-38, 71, 74). When the manager told the guard to call the police, so this story went, appellant thought the guard went to get help for the woman (Tr. 13, 39, 44). He was never told, he said, why he was arrested and recalled only being charged with uniform narcotics possession and vagrancy (Tr. 14, 17).

The security guard told one of the officers that appellant was illegally on the premises (Tr. 133). Officer Johnson, in turn, told appellant he was charging him with "illegal entry and narcotic paraphernalia" (Tr. 67, 101). He searched appellant's coat pockets and then transported him to the precinct (Tr. 71, 101, 115, 132, 140, 142). At the precinct he continued his search of appellant and found fifty-two capsules inside appellant's T-shirt (Tr. 68, 129). The capsules contained a white powder and appellant was charged with a violation of the Harrison Narcotic Act (Tr. 67-68, 106, 118-119, 129-131). At trial the only issue of fact raised by appellant was whether he had possession of the fifty-two capsules (Tr. 90-91). He renewed his motion to suppress evidence at the beginning of the trial (Tr. 94). No evidence was presented on the events leading up to appellant's arrest since the trial judge had heard the pretrial motion and remembered the facts (Tr. 88, 94-95). The

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on the bathroom floor (Tr. 25, 26, 27); the door was open and he went in (Tr. 27, 29). He never saw Green (Tr. 25).

motion was again denied and appellant noted an exception to the ruling (Tr. 95). Appellant made a motion to suppress evidence at the close of the government's case and it was denied; appellant noted his exception. (Tr. 137). The case went to the jury under appropriate instructions and the jury found appellant guilty (Tr. 175-189).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides, in pertinent part:

> The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . .

SUMMARY OF ARGUMENT

Appellant was lawfully arrested and the fifty-two capsules, seized pursuant to his arrest, were lawfully seized and properly introduced into evidence. Probable cause existed for the arrest: the arresting officer knew appellant was in a hotel in which he did not live inside a fifth floor bathroom with an unconscious woman who recently had taken a dose of narcotics; he heard appellant give conflicting and evasive explanations for his presence; he saw appellant sitting on the edge of the bathtub with empty glassine bags containing traces of white powder lying nearby on the floor; he witnessed the recovery of narcotic paraphernalia next to appellant's feet; and he was aware the hotel authorities apparently wanted appellant to leave. With this information in his possession, the police officer in the circumstances of this case had probable cause to believe appellant was committing or had committed a crime.

ARGUMENT

The arresting officer had probable cause to arrest appellant and the subsequent seizure of fifty-two capsules from appellant was therefore valid.

(Tr. 39, 44, 48, 133)

The record clearly shows that before making the arrest Officer Johnson was in possession of information: (1) the hotel authorities had summoned the police because appellant and an unconscious woman were found inside a bathroom on the permanent residents' floor; (2) appellant was sitting on the edge of the bathtub, fully dressed, inside a bathroom with an unconscious women he denied knowing and who had visible needle marks on her arm from taking narcotics; (3) appellant did not live at the hotel and gave conflicting and evasive explanations for being there; (4) there were two small, empty glassine bags containing traces of white powder, which appeared to be narcotics, lying on the floor; (5) narcotic paraphernalia was lying under the bathtub within inches of appellant's feet. The knowledge of Officer Felder that the security guard had said appellant was illegally in the hotel may be imputed to the arresting officer for purposes of assessing probable cause.[7] See *Smith* v. *United States*, —— U.S.App.D.C. ——, 358 F.2d 833 (1966); *Williams* v. *United States*, 113 U.S.App.D.C. 371, 308

[7] Officer Felder testified at trial that the security guard had "charged" appellant with unlawful entry and he and his partner, Officer Johnson, became the arresting officers (Tr. 133). Rather than interpret this to mean a citizen's arrest had taken place before the police arrived, it seems more likely that Officer Felder was saying the security guard had accused appellant of being guilty of unlawful entry and then the officers made their own assessment of the situation and concluded, properly, that there was probable cause to arrest appellant. Since appellant does not raise any issue with respect to the point at which he was arrested, it would appear this latter interpretation is more in accord with appellant's own position that for purposes of this appeal he was arrested for unlawful entry and possession of narcotic paraphernalia (Appellant's Brief, p. 10). Indeed, the evidence shows that appellant did not believe he was restrained when the manager called the police (Tr. 39, 44, 48).

F.2d 326 (1962). See also, *Melvin Brown* v. *United States*, D.C. Cir. No. 19,160, decided July 26, 1966, slip op. at 4.

Considering this evidence, probable cause existed for the officer to believe appellant was committing any number of crimes in his presence, among them unlawful entry, possession of implements of crime and conspiracy to violate the federal narcotic laws against possession and facilitation of concealment. Whether the arresting officer went through this legal reasoning before arresting appellant is immaterial. *Payne* v. *United States*, 111 U.S.App.D.C. 94, 96, 294 F.2d 723, 725, *cert. denied*, 368 U.S. 883 (1961). The facts in possession of the arresting officer must be considered as a whole, *Jackson* v. *United States*, 112 U.S.App.D.C. 260, 302 F.2d 194 (1962), and taken together they supplied a prudent and cautious police officer in the circumstances with reasonable grounds for believing (1) a crime was being committed in his presence and (2) a crime had been committed and the woman and appellant were the offenders. So providing they validated the arrest. *E.g.*, *Bell* v. *United States*, 102 U.S.App.D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958).[8]

The officer saw appellant on the permanent residents' floor inside the bathroom, apparently just sitting on the edge of the bathtub. He was not using it as would a person who was rightfully there. He knew the authorities lawfully in charge of the hotel said appellant did not belong there and they apparently wanted him to get off their premises. In addition, appellant admitted he did not live there and his explanation for being there—that he came to visit a friend who lived on another floor—was unconvincing and evasive; it did not ex-

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[8] Accord, *Williams* v. *United States*, 113 U.S.App.D.C. 371, 308 F.2d 326 (1962); *Jackson* v. *United States*, *supra*; *Dixon* v. *United States*, 111 U.S.App.D.C. 305, 296 F.2d 427 (1961); *Green* v. *United States*, 104 U.S.App.D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959); *Christensen* v. *United States*, 104 U.S.App.D.C. 35, 259 F.2d 192 (1958).

plain what he was doing on the fifth floor inside a bathroom with an unconscious woman he, allegedly, did not know. When to this probable cause is added the visual observation of the empty glassine bags with traces of narcotics and the narcotic paraphernalia, the probable cause becomes all the more clear. See *Ellis* v. *United States*, 105 U.S.App.D.C. 86, 264 F.2d 372, *cert. denied*, 359 U.S. 998 (1959). The practicalities of the situation amply permitted a reasonable officer to conclude that appellant was illegally in the hotel bathroom and that he was continuing to commit that crime in the officer's presence. The standard for determining the validity of a misdemeanor arrest without a warrant is whether the officer has probable cause for believing a crime is being committed in his presence. *Green* v. *United States*, 104 U.SApp.D.C. 23, 259 F.2d 180 (1958), *cert denied*, 359 U.S. 917 (1959). The officer could properly take into consideration the hotel guard's statement that appellant was illegally in the hotel. *Jackson* v. *United States*, *supra*; *Ex Parte Morrill*, 35 Fed. 261, 267 (C.C., D. Oregon, 1888). *Accord*, *Dixon* v. *United States*, 111 U.S.App.D.C. 305, 296 F.2d 427 (1961). His own evaluation of what was going on in the fifth floor bathroom was not based on mere whim or caprice; it was a reasonable conclusion based on what he knew and observed of the circumstances in which he found appellant.[9]

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[9] The cases cited by appellant are clearly distinguishable on their facts. *Bowman* v. *United States*, 212 A.2d 610 (D.C.C.A. 1965) concerned a railway station replete with signs and a public address system. Yet even there the court did not require the demand of the person lawfully in charge be verbal or in fact communicated to the person charged with unlawful entry. *Green* v. *United States*, *supra*, involved observations by officers of the defendant and another man long before the defendant even thought about going inside a private dwelling. The officers were on the scene as eye witnesses to all the defendants did. Even there, however, the court did not require the demand of the occupant had to be in a precise form. Nor was the court too exacting about when the warning had to be given to a person attempting to enter a dwelling. See dissenting opinion of Bazelon, J., 104 U.S.App.D.C. at 27, 259 F.2d at 184.

In both cases the court allowed reasonable inferences to be drawn

It is also clear that under, at least, two legal theories, the officer had reasonable grounds to believe appellant was in possession of the narcotics paraphernalia at the time he was arrested: first, under the theory of constructive possession, and second, under the theory of aiding and abetting. The narcotics paraphernalia was found between six and twelve inches from appellant's feet underneath the bathtub. The only other people in the bathroom when the officers arrived were the unconscious woman and the hotel manager, who found the paraphernalia. When the proximity of the paraphernalia to appellant is added to the fact that he, as between the manager and himself, was the only person in a position to put the paraphernalia under the tub the probable cause is clearly demonstrated. See *Jennings* v. *United States*, 101 U.S.App.D.C. 198, 247 F.2d 784 (1957). Although the paraphernalia could, in fact, have been under the bathtub without appellant's knowledge, the only question is whether it was reasonable for the arresting officer to conclude appellant knew it was there.[10] That his

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from the circumstances. So too in the instant case, the circumstances confronting the arresting officer—the presence and attitude of the people lawfully in charge of the hotel—could reasonably be interpreted by him to mean that appellant was remaining on the premises over their objections and after a demand had been made by them for appellant to leave. The officer need not be an eye witness to each element of an offense to conclude reasonably that the offense is being committed in his presence. *Accord, Jackson* v. *United States, supra; Ex Parte Morrill, supra,* 35 Fed. at 267.

[10] This is distinct from the question of guilt or innocence. The cases relied upon by appellant (Br. 18, 19) are concerned with guilt or innocence at trial and not probable cause. All the cases cited by appellant involve the definition of "possession" under the federal narcotic laws and the *presumption of guilt* arising from a finding that a defendant is in possession of the drugs. Secondly, in all the cases more than one conscious human being was present on the premises where the drugs were found and the courts were concerned with whether a defendant's possession was a knowing possession. Thirdly, appellant cites the cases for the proposition that something more than mere access, as distinct from presence, is necessary to prove possession. As appellee has attempted to show, more was involved in the instant case. Indeed, in view of the

conclusion was a reasonable one becomes clearer under the second theory, aiding and abetting. Assuming *arguendo* that the narcotic paraphernalia belonged to the woman, under the circumstances in which the officer found appellant and the woman he could reasonably conclude that appellant was aiding her by hiding the paraphernalia when the manager entered the bathroom. See *Gray* v. *United States*, 104 U.S.App.D.C. 153, 260 F.2d 483 (1958); *Cross* v. *United States*, 122 U.S.App.D.C. 380, 354 F.2d 512 (1965).[11]

Finally, when the officer entered the bathroom and observed the woman and the empty glassine bags, he had probable cause to believe a felony had been committed and appellant and the woman were the culprits. When the officer concluded the woman had passed out from a dose of narcotics and then saw the narcotic paraphernalia retrieved next to appellant's feet, he had probable cause to believe there was either a conspiracy to possess a narcotic drug, contrary to 26 U.S.C. § 4704(a), or a conspiracy to facilitate the concealment and sale of a narcotic drug, contrary to 21 U.S.C. § 174. *Marron* v. *United States*, 275 U.S. 192 (1927); *Payne* v. *United States*, *supra*. The record is clear about what the officer saw when he entered the bathroom; he saw two people, one an unconscious woman with visible needle marks on her arm, and appellant sitting on the bathtub with empty glassine bags nearby on the floor. It soon became clear to him that the woman had recently been taking narcotics. Appellant was sit-

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factual situations in *Jennings* v. *United States*, *supra*, and *Bates* v. *United States*, 95 U.S.App.D.C. 57, 219 F.2d 30 (1955), enough evidence of possession existed in the instant case for a court to find, at least, that there was probable cause to arrest appellant. It is worthy of note that in the cases cited by appellant the issue of possession was allowed to reach the trier of fact; the legality of the arrest was not questioned. In those cases it was a close question whether there was sufficient evidence of possession to sustain a verdict; *a fortiori* there was probable cause to arrest.

[11] In addition, appellant had closed and locked the bathroom door.

ting there but he denied knowing anything about the woman's condition or the narcotics. Then the manager found the narcotics paraphernalia next to appellant's feet. Add to this the fact that appellant did not belong in the bathroom or the hotel and the circumstances would cause an experienced and cautious police officer to believe appellant and the woman had come to the hotel for the purpose of using narcotics in an accessible room; that the woman was unquestionably a user and appellant either a user or supplier of the narcotics she had used; that appellant was at a loss to know what to do when the woman passed out and had concocted a story and attempted to hide the narcotic paraphernalia. The facts disprove the chance meeting appellant suggested.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,116

432

DONNIE C. THOMPSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States District Court
For The District Of Columbia

Calvin Davison
Pogue & Neal
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Counsel for Appellant
By Appointment of this Court

August 19, 1966

QUESTION PRESENTED

Did the District Court err in its denial of appellant's motion to suppress the admission into evidence of 52 capsules of heroin removed from his person after his arrest for unlawful entry and for possession of narcotics paraphernalia?

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JURISDICTIONAL STATEMENT

Judgment was entered in the District Court on March 28, 1966, finding appellant guilty of narcotic law violations and sentencing him to imprisonment for a term of five years. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On the morning of October 9, 1965, appellant was arrested by two officers of the District of Columbia Police Department in a public or semi-public bathroom on the fifth floor of the Hotel Dunbar. Charging him with "illegal entry" and the unlawful possession of narcotics paraphernalia, the officers took appellant to the 13th Precinct for booking (Tr. 67). During the booking process one of the arresting officers searched appellant and found 52 capsules of heroin concealed on his person (Tr. 68, 104-105, 129, 136). On the basis of this discovery appellant was booked for a violation of the Harrison Narcotics Act, as well as for unlawful entry (Tr. 72, 89, 106, 119). The record indicates that appellant was not booked for the possession of narcotics paraphernalia. The second "original" charge, that of unlawful entry, was later nolle prossed (Tr. 89-90).

Indicted for Harrison Narcotics Act violations, specifically 26 U.S.C. 4704a and 21 U.S.C. 174, appellant moved the District Court to suppress the admission into evidence of the

52 capsules which had been found in his possession. He contended there, as he contends here, that the capsules were obtained by an unlawful search and seizure following an unlawful arrest. At a hearing on January 14, 1966, this motion was considered and rejected (Tr. 81, 84). At his later trial, on February 24, 1966, appellant renewed his motion; it was again denied (Tr. 94-95). Appellant was thereupon found guilty by a jury of violations under both 26 U.S.C. 4704a and 21 U.S.C. 174 (Tr. 189). The sentences were concurrent, imprisonment for a term of five years.

Appellant testified that on the morning of October 9, 1965, he went to the Hotel Dunbar to look for a friend named Green (Tr. 10, 20). Entering at the 15th Street side of the building, he took an elevator to the fifth floor (Tr. 22, 24). Off the fifth floor hallway, in a bathroom with its door ajar, he saw an unknown young woman, later identified as Julia Gaston, lying unconscious on the floor (Tr. 11, 25, 27). Unable to revive her he sat down on the edge of the bathtub and waited for help (Tr. 12, 29).

Appellant was shortly confronted by a Dunbar guard, or Special Officer, who introduced himself as the "police". The Special Officer asked what had happened and whether the prostrate girl was appellant's girl friend. When appellant denied the relationship, the Special Officer admonished "Don't lie to me" and then left to call the police (Tr. 35, 36).

Next the hotel manager, Jesse Hagen, came to the bathroom

door where he encountered a Mr. Modkin, one of the resident guests, trying to gain admittance (Tr. 40, 76). According to Hagen, the door was locked and Mr. Modkin told him that a man and woman were inside (Tr. 77). Using his pass key, Hagen opened the door and "observed a female lying head towards the door * * * and a man sitting on the edge of the bathtub." Hagen proposed to call the police unless appellant explained the unconscious woman's presence (Tr. 78). Appellant answered that he was in the bathroom helping the woman and that he had come to the hotel to visit a friend (Tr. 42, 80). Appellant testified that he was not asked whether he was registered at the hotel and that he was not told to leave (Tr. 13, 42-44).

The arresting officers Johnson and Felder were summoned to the Dunbar in response to a call that someone was sick or injured. There they met the Special Officer who was waiting for them at the door (Tr. 58). Officer Johnson described his encounter with the Special Officer as follows:

> "A. He directed me to the fifth floor, told me that a man was up there and a woman was lying on the floor.
>
> Q. And did he say where on the fifth floor?
>
> A. In the bathroom.
>
> Q. Did he say anything further about either the man or woman?
>
> A. He said the woman was passed out in some way. Going upstairs on the elevator, he said they tried to talk to the man inside and tried to find out anything about him but they couldn't find anything out.
>
> Q. Do you remember anything else he might have said

before you arrived at the bathroom on the fifth floor? Do you remember anything you might have asked him?

A. I asked him the same question I asked the man, did he live there?

Q. Did you get an answer?

A. He said, No." (Tr. 59-60)

Arriving at the scene, Officer Johnson found Mr. Hagen "standing in the bathroom door. The defendant was sitting on the edge of the bathtub." (Tr. 60, 114). He saw Julia Gaston "stretched out on the floor in a passed-out condition . . . . One of her sleeves on her sweater was rolled up and there were visible marks, needle marks on her arm." (Tr. 60-61). In his opinion "I decided that she had taken a dose . . . . I decided that she had been shooting." (Tr. 69).

Officer Johnson "just looked at the woman on the floor to check and see if there was anything drastically wrong" (Tr. 62). He then asked appellant his name and whether he lived at the hotel. Told that he lived elsewhere, Officer Johnson asked appellant what he was doing at the hotel. Appellant replied that he had come to visit a friend on the sixth floor and that, while walking around, he happened to notice the woman in the bathroom. Appellant was unable to remember the name and room number of his friend (Tr. 63). It was apparently at this point that Officer Johnson searched appellant's coat. According to the officer's testimony "I put my hands into the pockets of his coat"; however, the search of the coat did not reveal anything (Tr. 14, 71, 103, 132).

The officers then returned to the unconscious woman and tried, unsuccessfully, to revive her. A small cellophane container or "deck" lay empty some five or six inches from Julia Gaston's head (Tr. 38, 63-64). Officer Johnson then wrapped Miss Gaston in her coat and "came back to Thompson to talk with him." (Tr. 65). At this point Hagen got down on his knees, reached under the bathtub and pulled out a black cloth containing narcotics paraphernalia: needles, syringes, bottle caps, and two empty "decks". (Tr. 47-48, 66-67, 79). Appellant denied ownership of the implements and "decks". (Tr. 74).

The record is conflicting as to when and under what circumstances appellant's arrest occurred. At least three versions exist.

According to appellant he was not told at what point and on what charges he was under arrest but was simply taken downstairs and placed in the patrol wagon -- at which time he assumed he was under arrest. (Tr. 14, 39, 48).

On the other hand, Officer Felder, who was at Officer Johnson's side throughout, testified that appellant's arrest had occurred even before their arrival. He attributed the arrest to the Dunbar's Special Officer.

"Q. Now, did you or did Officer Johnson place the defendant under arrest for unlawful entry?

A. Well, he was charged with unlawful entry by the Special Officer. We brought him downstairs.

Q. A Special Officer?

A. Yes.

Q. The Special Officer charged him?

A. That's the charge that was placed against him; we became the arresting officers." (Tr. 133).

Officer Johnson told a third story -- differing not only from appellant's but from Officer Felder's as well. His testimony was as follows:

"Q. Now, what did you do then?

A. We took the defendant downstairs.

Q. Did you say anything to him before you took him downstairs?

A. I said, I am charging you with unlawful entry at this time, and narcotics paraphernalia.

Q. Did you say the word 'unlawful entry' to him then?

A. I said 'illegal entry and narcotics paraphernalia'.

Q. You said this to him?

A. Yes." (Tr. 67).

Escorted downstairs appellant was given a "pat down" by the officers before being placed in the patrol wagon (Tr. 115-116, 135, 143). Strapped to a chair, the still unconscious Miss Gaston was carried downstairs and was placed in the patrol wagon with appellant (Tr. 16, 67). Together they were taken to the 13th Precinct for booking. (Tr. 117). It was at this point that Officer Johnson, conducting another and more thorough search, detected a brown bag rolled up in appellant's undershirt below the belt buckle. (Tr. 68, 104, 118). Inside the bag were 52 capsules containing heroin. This discovery formed the basis for the Harrison Narcotics Act charge then filed

against appellant (Tr. 106) and for the indictment later returned by the Grand Jury.

Julia Gaston, on the other hand, was charged with drunkenness. Having posted collateral, she was released from custody. Officer Johnson testified that no other charges were placed against her and that he never interrogated her with regard to the events at the Dunbar Hotel (Tr. 70-71).

STATEMENT OF POINTS

The District Court erred in admitting into evidence, over appellant's timely objection, 52 capsules seized from appellant's person as the fruit of an illegal arrest.

STATUTES

Title 21, Section 174 of the United States Code provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the

defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, Section 4704a of the United States Code provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Title 22, Section 3601 of the District of Columbia Code provides:

"No person shall have in his possession in the District any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement. Whoever violates this section shall be imprisoned for not more than one year and may be fined not more than $1,000, unless the violation occurs after he has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be imprisoned for not less than one nor more than ten years. (June 29, 1953, 67 Stat. 97, ch. 159, § 209(a).)

Title 23, Section 306 of the District of Columbia Code provides:

"(a) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of any section listed in subsection (b), by police officers, as in the case of a felony, upon probable cause that the person arrested is violating the section involved at the time of the arrest.

(b) Subsection (a) shall apply with respect to section 22-3601 (possession of implements of crime), sections 22-3203, 22-3204, and 22-3214, providing for the control

of dangerous weapons in the District, and section 22-1502 (possession of lottery tickets).

(c) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section.

(d) No evidence discovered in the course of any arrest, search, or seizure authorized by this section shall be admissible in any criminal proceeding against the person arrested unless at the time of such arrest he was violating one of the sections referred to in subsection (b) or had in his possession property taken in violation of the section referred to in subsection (c). (June 29, 1953, 67 Stat. 96, ch. 159, § 207.)"

Title 22, Section 3102 of the District of Columbia Code provides:

"Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 824; Mar. 4, 1935, 49 Stat. 37, ch. 23; July 17, 1952, 66 Stat. 766, ch. 941, § 1.)"

SUMMARY OF ARGUMENT

This appeal challenges the legality of appellant's warrantless arrest and of the resulting search and seizure to which he was subjected when he was taken into custody at the Hotel Dunbar on the morning of October 9, 1965. At the trial testimony concerning the circumstances of the arrest was ambiguous

and conflicting. One of the District of Columbia police officers called to the scene credited the hotel guard with appellant's arrest on the single charge of unlawful entry. The second police officer claimed that he had made the arrest - not only for unlawful entry but for possession of narcotics paraphernalia as well. For purposes of this appeal appellant adopts this second version of the arrest - the one most favorable to the government - and denies that either charge constituted a proper and lawful basis for arrest.

It is appellant's contention that the possession charge was patently untenable because appellant did not have, and did not appear to have, either actual or constructive possession of the narcotics paraphernalia at the time of his arrest. The various implements were discovered under a bathtub in one of the guest bathrooms in the hotel. The hotel manager was the finder and he immediately gave the items to the police officers who were present during and prior to the discovery. Since appellant did not have the paraphernalia on his person and did not have control over the area where they were found, he was not in possession of the implements of a crime, a misdemeanor under District of Columbia law.

The second charge was also invalid. The misdemeanor of unlawful entry was not committed in the presence or in the view of the arresting officers. As with the narcotics paraphernalia charge, the alleged crime was not committed at all.

The subject violation does not occur unless a person enters upon the premises after being advised not to or remains upon the premises after being told to depart. The record is barren of any warning being given appellant, at any time, either before or after his arrival at the hotel.

Accordingly, appellant's arrest was unlawful as was the ensuing search and seizure of his person which uncovered the illicit narcotics capsules. Under Rule 41(e), Fed. R. Crim. P., a person who is the victim of an unlawful search and seizure may move to suppress any evidence obtained on the ground that the property was illegally seized without warrant. Appellant, having been unlawfully arrested and searched, moved for suppression of the capsules taken from his person; this motion was denied both at the hearing and at the trial. The exclusionary rule of Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) requires that the fruits of an unlawful arrest or of an unlawful search and seizure must be suppressed; and the District Court erred in denying appellant's motion.

I. APPELLANT'S ARREST FOR UNLAWFUL ENTRY WAS IN ERROR SINCE HIS ENTRY AND CONTINUED PRESENCE ON THE PREMISES WAS NOT AGAINST THE EXPRESSED WILL OF THE LAWFUL OCCUPANT. 1/

The first basis for appellant's arrest was unlawful entry, the only charge for which appellant was both arrested and booked, and the only charge concerning which the government's testimony

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1/ Tr: 10, 13, 20, 23, 35, 36, 42-44, 67).

was consistent as being the basis for his arrest. A warrantless arrest on this charge is not lawful if predicated upon "probable cause" but, as a misdemeanor, is subject to the requirements of D.C. Code § 4-140, which allows the police "to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any... offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District ... ." Unlike the standard for felony arrests set out in § 4-141 and misdemeanor arrests covered by § 23-206, the determination under § 4-140 is whether the misdemeanor charged was in fact committed in the presence or within the view of the arresting police officer. Unless it was, both the arrest of the accused and the seizure of articles from his possession were unlawful acts. Under such circumstances such articles would not be admissible in evidence against the accused.

The proscription of § 22-3102, unlawful entry, is against

> "Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property...against the will of the lawful occupant... or being therein or thereon, without lawful authority ... shall refuse to quit the same on demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor... ."

The foregoing thus relates to both an initial entry upon the property or one's continued presence thereon. In either instance, however, the lawful occupant or the person in charge must undertake to forewarn the would-be trespasser that his entry or continued presence on the premises is forbidden. As regards the initial entry, it "must be against the expressed will [of the lawful occupant], that is, after warning to keep off." W.H. Bowman v.

United States, D.C. App., 212 A.2d 610, 611 (1965). As Bowman makes clear, the expression may be oral or written, by announcement or by sign, so long as there is some expression, some communication that a potential trespasser keep off the premises or that a person already on the premises quit.

Appellant, upon entering the hotel, saw no signs requiring that guests or visitors first announce themselves at the front desk. (Tr. 23). There is nothing in the record to indicate that he was told or in any way advised to keep off the premises at the time of his entry. He testified, without contradiction, that a warning was not given. (Tr. 13). Absent such a warning, expressing the will of the person in charge, Appellant's initial entry was not a criminal violation under § 22-3102. Yet, even if it were, such entry was completed long before the arresting officer and his companion arrived on the scene. It did not take place in the officer's presence or within his view, as § 4-140 requires for a warrantless arrest on a misdemeanor charge. To be contrasted with the instant case is the situation considered by this Court in Green v. United States, 104 U.S. App.D.C. 23, 259 F.2d 180 (1958), where the accused attempted to enter a private dwelling after the occupant's protest and in the presence of the arresting policy officers.

When discovered in the bathroom, appellant had already completed the entry. At that point and thereafter he would have been guilty of unlawful entry only if he had been ordered to leave the premises and had failed to do so. As the record shows, however, neither the hotel guard, the hotel manager nor anyone else

asked Appellant to leave the hotel. Missing then is the essential element that the accused "shall refuse to quit the same on demand of the lawful occupant, or of the person lawfully in charge thereof ... ."

The record indicates to the contrary. Rather than ordering Appellant's departure, the hotel guard and hotel manager - as well as the police officers - acted to detain him. Thus, not only was a demand to quit not given, but Appellant's continued presence on the hotel premises would seem to have been with lawful authority of the person lawfully in charge.

In short, Appellant entered and remained in the fifth floor bathroom without his entry or continued presence ever being objected to. Upon their arrival police officers Johnson and Felder at no time observed Appellant refusing to comply with a demand that he leave - for the simple reason that such a demand was never made. Accordingly, the arresting officer did not have a proper basis to arrest Appellant for unlawful entry. That being true, the arresting officer did not have a proper basis to search Appellant's person and to seize the narcotics found in his possession.

II. APPELLANT DID NOT HAVE POSSESSION OF NARCOTICS PARAPHERNALIA AT THE TIME OF HIS ARREST; HENCE HIS ARREST ON THAT BASIS WAS ERROR. 1/

As earlier noted, one of the two charges for which Appellant was taken into custody - according to the testimony of one of the police officers - was the possession of narcotics paraphernalia.

1/ Tr. 47-48, 66-67, 79.

In allegedly placing this charge against Appellant the arresting officer evidently had in mind, and relied upon, the provisions of D.C. Code § 22-3601 (1961), which forbids the unexplained possession of implements of a crime.[1/] In combination with the foregoing section, § 23-306(a) and (b) of the D.C. Code authorizes a warrantless arrest and attendant search "as in the case of a felony, upon probable cause that the person ... at the time of his arrest" has in his possession an implement which, in the language of § 22-3601, "is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement."

By its adoption of the "probable cause" or felony standard for arrest, § 23-306(a)-(c) marks out a limited departure from the prevailing rule, embodied in § 4-140, which allows a police officer to make a warrantless arrest for a misdemeanor only if it is actually committed in his presence or in his view. Yet, even under the relaxed standard of § 23-306(a)-(c), and notwithstanding the existence of probable cause, evidence obtained by an arrest and search pursuant thereto must be excluded if the offense charged was not in fact committed. Such is the mandate of § 23-306(d) which declares: "No evidence discovered in the course of any arrest, search, or seizure authorized by this section shall be admissible in any criminal proceeding against the person arrested unless at the time

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1/ § 22-3601 served as a justification for the arrest in Jennings v. United States, 101 U.S.App.D.C. 198, 247 F.2d 784 (1957) wherein the police had discovered appellant in possession of narcotics paraphernalia.

of such arrest he was violating one of the sections referred to in subsection (b)", inter alia § 22-3601.

Appellant contends, first, that his arrest for possession of narcotics paraphernalia was unlawful, as without probable cause; second, that he was not in law guilty of violation § 22-3601. Under either theory, evidence concerning the subject narcotics capsules was not admissible in the ensuing proceeding against appellant for alleged violations of the Harrison Narcotics Act.

In the oft quoted language of Carroll v. United States, probable cause exists where "the facts and circumstances within their [the officers] knowledge, and of which they had reasonable trustworthy information, [are] ... sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense is being committed. 267 U.S. 132, 162, 45 S.Ct. 280, 69, L.ed. 543 (1925). The "facts and circumstances" here were not such as to support a reasonable belief that appellant had narcotics paraphernalia in his possession at the time of his arrest.

Officer Johnson's search of Appellant's coat before the arrest had already established that Appellant was not carrying narcotics paraphernalia in at least one article of his clothing. There was nothing to indicate or even suggest that Appellant had such paraphernalia elsewhere on his person. There was even less of a basis for such suspicion when Mr. Hagen, the hotel manager, brought to light the cache of paraphernalia from under the bath tub. It was immediately after this discovery that Appellant was

placed under arrest for possession. Even if the arresting officer indulged in speculation that Appellant once had possession of the various narcotics implements, it is clear that he did not have possession at the time of their discovery and Appellant's arrest. Nor was there probable cause to so believe. It is not enough under § 23-306 for the officer to have probable cause for believing that Appellant formerly had in his possession the implements of a crime. Under the statute the officer must have probable cause to believe that presently, "at the time of arrest", the accused has such illicit implements in his possession. The circumstances here were clear and obvious that Appellant did not then have possession of the implements, for it was the hotel manager who retrieved the articles from beneath the bath tub. If Mr. Hagen did not have possession at the time of arrest, certainly the arresting police officer did, since he was in direct and immediate charge of the location and the persons there present.

Apart from the absence of probable cause, the capsules found on Appellant's person were rendered inadmissible by the requirements of § 23-206(d), that the offense must actually be committed; the admission of such evidence the fruits of the improper search and seizure, over Appellant's repeated objections, was error.

The paraphernalia in question were found under a bath tub in the fifth floor bathroom of the Hotel Dunbar. The bathroom opened onto the hallway and was "for the guests of the hotel". (Tr. 101). As such the facilities were open for and accessible

to not only guests of the hotel but anyone else who might happen by. Without the power of dominion and control over the bathroom and its contents, appellant assuredly did not have present possession of the premises and of the paraphernalia found under the bath tub. Appropriate in this regard is this Court's decision in Jackson v. United States, 102 U.S.App.D.C. 109, 250 F.2d 772 (1957), a case involving the alleged possession of narcotics and the presumption of guilt which follows therefrom under 26 U.S.C. § 4704(a). In issue there was the question whether the Appellant had possession of his nephew's room, where narcotics were found and to which he had a key. Said the Court in denying such possession:

> "There is no statutory presumption of guilt on the part of an individual not shown to have been in 'possession' of the drugs, but merely to have had access to the room of another where the drugs were hidden. It is doubtful whether such a statutory presumption could be upheld, for it cannot be factually presumed that a person having a key to another's room has control of drugs hidden therein. It cannot even be presumed that he knows of the presence of the drugs." 250 F.2d at 773.

In Jackson presumably only the appellant and his nephew had access to the latter's room. How much less the basis for a finding of possession in this case where so many more persons had access to the area in question. Also in point is this Court's decision in Davis v. United States, 107 U.S.App.D.C. 76, 274 F.2d 585 (1959) cert denied sub nom. Ellis v. United States, 363 U.S. 806, 80 S.Ct. 1241, 4 L.ed 2d 114. There, in the course of a raid on a private dwelling, a suspected gambling den, the police

apprehended Appellant Berry in an upstairs bedroom strewn with lottery paraphernalia. This Court observed:

> "Because there was no evidence tending to show that these appellants [among them, Berry] owned any of these materials or were in control of the premises, the trial judge directed a verdict of acquittal with respect to the possession [of lottery tickets] count." 274 F.2d at 586.

Agreeing with this action, this Court confirmed later in its opinion that "there was no probative evidence that he was in possession of numbers slips." 274 F.2d at 588. Again, in this case the range and number of persons having admittance to the fifth floor bathroom was surely greater than the range and number of persons frequenting the premises in the Davis case. Possession depends upon dominion and control over the subject matter so that, as observed in an eighth circuit narcotics case, "mere proximity to the narcotic... or mere presence on the property where the narcotic is found is not sufficient proof of possession." Bass v. United States, 326 F.2d 884, 886 (8 Cir. 1964), cert denied 377 U.S. 905, 84 S.Ct. 1164, 12 L.ed 2d 176; accord, Arellanes v. United States, 302 F.2d 603, 606 (9 Cir. 1962) cert. denied 371 U.S. 930, 83 S.Ct. 294, 9 L.ed. 2d 238). Moreover, "it must, of course, be a knowing possession." Guevara v. United States, 242 F.2d 745, 746-747 (5 Cir. 1957). Accordingly, the Court in Guevara reversed a District Court conviction for narcotics violations on the basis that there was no proof appellant knew of the marijuana cigarettes found in his car. As the Court observed: "The cigarettes were in such position in the

car that they could easily have been placed in the unlocked vehicle by any person." 242 F.2d at 747. Here appellant neither had control of the subject premises nor does the record contain any evidence that he knew of the concealed paraphernalia. And it is firmly established that "an illegal search cannot be legalized by what it brings to light." Nueslein v. District of Columbia, 73 App.D.C. 85, 115 F.2d 690, 694 (1940).

CONCLUSION

On the basis of the foregoing, the Court should reverse the judgment entered herein, order that the indictment against Appellant be dismissed, and enter judgment of acquittal.

Respectfully submitted,

/s/ Calvin Davison

Calvin Davison
Counsel for Appellant
by Appointment of this Court

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief upon David G. Bress, United States Attorney for the District of Columbia and counsel for appellee, at his offices in Room 3600, United States Court House, 3rd and Constitution Avenue, N.W., Washington, D. C., on this 19th day of August, 1966.

/s/ Leonard C. Peterson

Leonard C. Peterson

August 19, 1966

10/19/66
MWT
9:30 am

WILBUR K. MILLER

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,116

DONNIE C. THOMPSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From The United States District Court
For the District of Columbia

Calvin Davison
Pogue & Neal
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Washington, D. C. 20036

Counsel for Appellant
By Appointment of this Court

October 11, 1966

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Appeal From The United States District Court
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REPLY BRIEF FOR APPELLANT

I. The Lawfulness Of Appellant's Arrest Depends On (1) Whether The Misdemeanor Of Unlawful Entry Was Committed In The Presence Of The Arresting Officers Or (2) Whether Appellant In Fact Committed The Misdemeanor Of Possession Of The Implements Of Crime. 1/

Appellee's brief purports to set forth the law on a whole host of offenses that have no relevance to this case since Appellant was not arrested for those offenses. Having constructed this theoretical web of offenses for

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1/ Tr: 70-71, Tr: 5-9.

the first time on brief to this Court, Appellee then attempts to demonstrate that probable cause might have been found to arrest Appellant for those offenses if this Court will only believe certain assumptions which Appellee makes, but which have no support in the record. Whether Appellant was lawfully arrested must be judged on the record, not on the frail assumptions in Appellee's brief.

As set forth in Appellant's brief (pp. 5-6), the record contains at least three versions of his arrest: (1) Appellant's own version that he was not informed of the charges being placed against him, but was merely taken to the patrol wagon; (2) Officer Felder's testimony that a citizen's arrest was carried out by a special officer who worked for the Dunbar Hotel; and (3) Officer Johnson's testimony that he arrested Appellant for "illegal entry and narcotics paraphernalia". 1/ While the testimony of the police officers is in conflict concerning the arrest, Appellant on this appeal has assumed that the Court below chose to believe the version most favorable to Appellee - that is, Officer Johnson's testimony.

1/ Apparently it took some legal ingenuity to decide which charges had the most likelihood of being sustained against Appellant. After Appellant was taken to the station house at the 13th Precinct and searched, he was booked on "Violation Uniform Narcotics Act (Possession)", "Harrison Narcotic Act", and "Illegal Entry". Officer Johnson prepared charges against Appellant in the Court of General Sessions which alleged violation of the Uniform Narcotics Act (Possession), Section 33-402, Title 33, D.C. Code; violation of the Uniform Narcotics Act (Vagrancy), Section 33-416a, Title 33, D.C. Code; and unlawful entry, Section 22-3102, Title 22, D.C. Code. The Assistant U.S. Attorney entered nolle proseque against all three of these charges in the Court of General Sessions. Appellant was in fact indicted and subsequently convicted for violation of the Harrison Narcotics Act, the indictment being based upon possession of 52 capsules of heroin discovered in the search of Appellant's person at the station house after he had been arrested.

As more fully set forth in Appellant's brief (pp. 11-14), the misdemeanor of unlawful entry was not committed in the presence of the arresting officers and hence provided no basis for a lawful arrest of Appellant.

As to the misdemeanor charge of possession of narcotics paraphernalia, while the D.C. Code permits arrest on the basis of probable cause as in the case of felonies, the Code contains a protective provision in § 23-306(d) which provides that, notwithstanding the existence of probable cause, evidence obtained by an arrest and search pursuant thereto must be excluded if the offense charged was not in fact committed. As more fully set forth in Appellant's brief (pp. 14-20), not only does the record show that probable cause did not exist for the arrest of Appellant on this charge, it shows this offense was not in fact committed. Appellee misconceives the question on appeal by focusing only on whether probable cause existed for Appellant's arrest.

With respect to the charge of unlawful entry, Appellee attempts to impute alleged knowledge on the part of Officer Felder to the arresting officer, Officer Johnson. (Appellee's brief, pp. 7-9). Officer Felder's knowledge cannot be imputed to Officer Johnson, however, since the latter was not acting under Felder's orders when he made the arrest. In fact, Officer Felder testified that the arrest was made by the hotel security guard. Furthermore, there is not one shred of evidence in the record that

either the hotel security guard or the hotel manager ever asked Appellant to leave the premises and that, having been so asked, Appellant refused to do so. The hotel manager testified at both the trial and the hearing on the motion to suppress evidence and at no time stated that Appellant had refused a request to leave the premises.

With respect to the charge of possession of narcotics paraphernalia, Appellee raises for the first time in this Court the possibility that Appellant might have been arrested for aiding and abetting in the commission of that crime. This new theory depends on an assumption (Appellee's Brief, p. 11) that the narcotics paraphernalia found in the bathroom belonged to Julia Gaston, the unconscious woman in the bathroom at the time of arrest, and upon an assumption that there existed a conspiratorial relationship between Appellant and Julia Gaston. The record contains no evidence with respect to these newly assumed relationships - beyond the mere fact of contemporaneous physical presence in a public bathroom of a hotel - or with respect to whether the police officers reasonably believed that such relationships existed. Officer Johnson testified that Julia Gaston was booked for drunkenness, posted collateral and was released. He testified that no effort was made to determine whether the narcotics paraphernalia belonged to her. (Tr: 70-71). No evidence was introduced either at the hearing on the motion to suppress or at the trial to show a conspiratorial relationship between Appellant and Julia Gaston. The Court below, in fact, refused

to receive evidence on whether Julia Gaston even knew Appellant. (Tr: 5-9). Appellant's mere presence in a hotel public bathroom containing an unconscious woman and narcotics paraphernalia hidden under the bathtub cannot itself give rise to probable cause to arrest him for possession of such paraphernalia. United States v. Di Re, 332 U.S. 581, 593-594 (1948); Lyons v. United States, No. 3994, D.C. Ct. App., July 25, 1966.

Where the Government defends the legality of an arrest, upon which depends the propriety of a search, on one basis at trial, it cannot advance for the first time on appeal a different basis for defense of the arrest. Giordenello v. United States, 357 U.S. 480 (1958).

II. Appellant's Unlawful Arrest Cannot Be Validated By Evidence Seized Pursuant To A Search Following That Arrest.

Appellee contends finally (pp. 11-12 of Brief) that the arresting officer had probable cause to believe that there was a conspiracy (between Appellant and Julia Gaston) to possess a narcotic drug, contrary to 26 U.S.C. § 4704(a), or a conspiracy to facilitate the concealment and sale of a narcotic drug, contrary to 21 U.S.C. § 174. Stripped of the conspiracy element, these were the charges on which Appellant was eventually convicted after the search of his person at the station house. They were not, however, the charges on which he was arrested.

As the Supreme Court has had occasion to point out:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. 15/ In law it is good or bad when it starts and does not change character from its success." United States v. Di Re, 332 U.S. 581, 595 (1948). (Footnote omitted).

As set forth in Section I of this Reply Brief, there is no basis in the record for finding that the arresting officers reasonably believed a conspiratorial relationship existed between Appellant and Julia Gaston. The arresting officers have never suggested that they arrested Appellant for the crimes which Appellee now says they might theoretically have. If the existence of probable cause is a question to be determined on the basis of the facts before the police officer at the time he makes an arrest and what those facts mean to him, the Court cannot ignore, as Appellee would have it do, what the facts actually did mean to the arresting officers in this case at the time of arrest as shown by their own testimony as to the basis for their arrest of Appellant.

Even if the record would support a finding that the officers had sufficient facts before them prior to the arrest of Appellant and the search of his person to provide probable cause to arrest him on the charges now suggested by Appellee, it would be unsound to allow the legality of an arrest to depend, not on what the arresting officers told Appellant he was

being arrested for, but on what trained counsel believe the facts might support and when that basis for the arrest is set forth for the first time on appeal. Cf., United States v. Di Re, 332 U.S. 581, 592 (1948); Bell v. United States, 102 App. D.C. 383, 254 F.2d 82 (1958); Payne v. United States, 111 App. D.C. 94, 294 F.2d 723 (1961).

Respectfully submitted,

/s/ Calvin Davison

Calvin Davison
Counsel for Appellant
By Appointment Of This Court

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Reply Brief upon David G. Bress, United States Attorney for the District of Columbia and counsel for Appellee, at his offices in Room 3600, United States Court House, 3rd and Constitution Avenue, N.W., Washington, D.C., on this 11th day of October, 1966.

/s/ Patrick W. Lee

Patrick W. Lee

October 11, 1966